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No. 91-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MESA OPERATING LIMITED PARTNERSHIP,
Petitioner,

v.

U.S. DEPARTMENT OF THE INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY OF PETITIONER

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1. The Brief in Opposition fails to deal with the primary issue presented by the Petition: whether the Fifth Circuit properly deferred to the interpretation by the Department of the Interior of a statute (the Natural Gas Policy Act of 1978 (NGPA)) administered by, and an implementing decision and regulations promulgated by, another agency, the Federal Energy Regulatory Commission, where FERC's views were not obtained by DOI or the reviewing courts.

The Brief in Opposition does recognize that the case presents interpretation of Congress's purpose and intent in enacting the NGPA in general and Section 110 in particular and the intent of the FERC in issuing its Order 94

and the implementing regulations. Opp. at 12-14. The government simply argues, however, that DOI's position on those issues is correct. While conceding that Section 110 encourages production of low-quality gas, the Brief in Opposition argues for DOI that this was not an "overriding 'desire' " of Congress or the FERC, and that even if Congress and the FERC have wished Section 110 and Order 94 to encourage production of low-quality gas, that policy would not be injured by the DOI's insistence on subjecting reimbursement of post-production expenses to royalty and thus denying the full reimbursement of those costs to the supplier of those services. Opp. at 13-14.

Thus the government effectively concedes that proper resolution of the issue depends upon the assessment of the meaning and intent of issues outside the DOI's, and within the FERC's, area of responsibility and expertise: the NGPA and particularly Section 110, the purposes of the FERC in issuing the Order 94 decision and regulations implementing Section 110, and an assessment of the impact on the Section 110/Order 94 policy of DOI's insistence on charging royalty on Order 94 cost reimbursements. Moreover, there is no dispute that the decision below prevents Mesa from being fully reimbursed for the costs of post-production services that Section 110 and the Order 94 regulations provide for. Thus, there can be no question that the DOI decision and that of the court of appeals "trench upon" the FERC's jurisdiction. But instead of recognizing that the FERC should have some role in the assessment of such issues, the government repeats DOI's view and asks this Court to make its own determination.

This is inappropriate. As this Court has held, "[f]or a court to attempt to answer [such] questions without the views of the agenc[y] responsible for enforcing [the statute] would be to 'embar[k] upon a voyage without a compass.' " *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1990) (citing *Ford Motor Credit Co. v. Milhollin*, 444

U.S. 555, 568 (1980)). In its avoidance of any mention of the role of the agency charged by Congress to administer and implement the NGPA, the rationale of the Brief in Opposition is at odds with *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) itself—which the brief does not even cite. Indeed, the government goes further even than the court of appeals, which recognized that it might have reached a different result if there had been "contrary indications from FERC . . . ." Pet. App. 17a. There could hardly be a clearer indication than this remark from the court of appeals that this Court's guidance is necessary for cases like the present that involve one federal agency interpreting and applying the law, policy, and regulations of another.[1]

2. The government challenges Petitioner's assertion that the DOI's position leads to the irrational result that the lower the quality of gas that the government's lease supplies, the higher the royalty that the government obtains. Opp. at 16-18. But the court of appeals itself called this result an "anomaly," but held that that was "a consequence of the NGPA/FERC price regulation system and not of the [DOI] scheme setting out the royalty

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[1] In a footnote the government claims that Petitioner did not raise below the argument that the FERC's views should be obtained. Brief in Opposiiton at 16 n.11. This is incorrect. Petitioner specifically argued to the court of appeals that "despite numerous admonitions from [that court]" the DOI had never "conferred with the FERC concerning the impact of the DOI's royalty demand on FERC's regulatory scheme," and that neither the DOI nor the courts were "free to disregard FERC's actions." Brief of Appellant at 22 n.22, 38 and n.38, *Mesa Operating Limited Partnership v. U.S. Department of Interior*, 5th Cir., No. 89-4775, January 3, 1990. Petitioner also quoted at that point in its brief (*id.* at 38) the Fifth Circuit's notation in its earlier decision in *Diamond Shamrock Exploration Co. v. Hodel*, 853 F.2d 1159, 1161 n.1, that it had there "asked for and received amicus briefs from the [FERC]" to assure that its decision "would not interfere with the FERC's authority to set natural gas policy under the [Natural Gas Act] and the NGPA." In fact, on the partial basis of the FERC authorities cited in that brief (see 853 F.2d at 1167-68) the DOI lost *Diamond Shamrock*.

owner's rights." Pet. App. 15a. That one agency can succeed in reading the statute and regulations of another to produce a result recognized as anomalous by the reviewing court strikes Petitioner as further reason why the second agency's views ought to be consulted.

Moreover, there is simply no sense to the government's obtaining a royalty from Mesa on reimbursement for value and quality added to the gas by Mesa *after* the gas has been severed from a government lease. As we noted in the Petition (at 15 n.32) and as not contested by the government, state law is uniformly to the contrary of DOI's position, and state law is based precisely on the consideration that the lessor is not entitled to royalty on value added to the gas "by processing or transporting it" after production by the lessee. *E.g., Piney Woods Country Life School v. Shell Oil Co.*, 726 F.2d 225, 231 (5th Cir. 1984) (Mississippi law).

CONCLUSION

For the reasons given herein and in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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